STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY DWIGHT BANKS,

Defendant-Appellant.

UNPUBLISHED
May 21, 1999

No. 208321
Saginaw Circuit Court
LC No. 95-011496 FH

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of uttering and publishing, MCL 750.249; MSA 28.446, and sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to serve not less than five years nor more than twenty-eight years in prison. Defendant appeals as of right. We affirm.

Defendant's conviction arose after Marian Wallace, an elderly nursing home resident, discovered one of her personal checks had been cashed at Second National Bank by defendant without her permission. Defendant first argues that the trial court erred in denying defendant's motion for a directed verdict. When reviewing a trial court's ruling on a motion for directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998). The court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *Id*.

The elements of uttering and publishing are (1) that the defendant knew the instrument was false; (2) that he had an intent to defraud; and (3) that he presented the forged instrument for payment. MCL 750.249; MSA 28.446; *People v Dukes*, 189 Mich App 262, 265; 471 NW2d 651 (1991). Here, defendant challenges the knowledge and intent elements of the crime. Regarding the knowledge and intent elements, "[i]ntent and knowledge can be inferred from one's actions and, when knowledge is an element of an offense, it includes both actual and constructive knowledge." *People v American Medical Centers of Michigan, Ltd*, 118 Mich App 135, 154; 324 NW2d 782 (1982). Constructive

knowledge means notice of facts and circumstances from which guilty knowledge may fairly be inferred. *People v Blackwell*, 61 Mich App 236, 240; 232 NW2d 368 (1975).

In this case, Ruth Lich, Wallace's friend and co-signer on her checking account, testified that Wallace kept all her checks in a drawer in Wallace's room at the nursing home, that she was the only other person with permission to sign Wallace's checks, and that neither she nor Wallace had signed the check in question. Wallace identified the check as hers and stated that it had not been signed by her or Lich, that she did not know defendant, nor had she given him permission to sign the check. Further, the bank teller identified defendant as the man who cashed Wallace's check. The jury also heard a tape recording of defendant's interview with the police,[1] in which he indicated that he received the check from a woman named Vonseal Colbert, watched her put his name on it as the payee, asked her whether it was "hot," and then decided to cash it for Colbert. Defendant admitted that the first bank where he tried to cash the check would not accept the check, but he proceeded to Second National Bank where the teller cashed the check.

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that defendant knew or at least had constructive knowledge that the check was stolen or forged, thus satisfying the first element of uttering and publishing. Similarly, a rational trier of fact could conclude that he had an intent to defraud, thus satisfying the second element of uttering and publishing. Defendant admitted to cashing the check, thus satisfying the third element of presentment. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict.

Defendant next argues that he was denied the effective assistance of counsel when his attorney failed to cross-examine Wallace at defendant's preliminary examination. Because defendant did not request an evidentiary hearing or move for a new trial, our review is limited to those mistakes apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). The record reveals that defendant, represented by his first appointed attorney, waived his right to the preliminary examination. The prosecutor requested that the testimony of Wallace be taken due to the fact that she was present at the court. Wallace was shown the check that defendant cashed and identified it as one of her checks. She denied giving anyone permission to sign the check, and indicated that the only person with permission to sign her checks was Lich. Wallace further indicated that Lich had not signed the check. Finally, Wallace testified that she had never seen defendant before, and that she had not given him permission to cash a check for her. Defense counsel did not pose any questions to Wallace. At trial, the court ruled that Wallace was unavailable to testify due to her ill health and, pursuant to MRE 804(b)(1), allowed Wallace's preliminary examination testimony to be read into the record.

Effective assistance of counsel is presumed, and the defendant bears the burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant argues that in light of Wallace's "damaging" testimony, defense counsel should have cross-examined her at the preliminary examination. Decisions concerning whether to call or question witnesses are presumed to be matters of strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). There is simply no information in the record regarding why defense counsel chose not to question Wallace, and this Court will not substitute its judgment for that of counsel regarding matters of strategy. *People v*

Barnett, 163 Mich App 331, 338; 414 NW2d 378 (1987). On this record, we cannot conclude that the decision not to question her fell bellow an objective standard of reasonableness. *People v Torres*, 222 Mich App 411, 424; 564 NW2d 149 (1997). Furthermore, there is nothing in the record to suggest that had defense counsel questioned Wallace at the preliminary examination, it would have changed the outcome of defendant's trial. *Id*. at 424. Accordingly, defendant has failed to overcome the presumption that counsel was effective, in that he has failed to show that counsel's performance fell below an objective standard of reasonableness resulting in prejudice to defendant. *Id*.

Finally, defendant argues that the trial court erred by allowing the prosecutor to effectively amend the information to include an aiding and abetting theory by granting the prosecutor's request for an instruction on aiding and abetting. Defendant did not raise this specific objection below.[2] Accordingly, this issue is not preserved for this Court's review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In any event, Michigan has abolished by statute the distinction between being a principal of a crime and an aider and abettor to a crime. MCL 767.39; MSA 28.979. Therefore, it is not necessary for a prosecutor to charge a defendant in any other form than as a principal, *People v Lamson*, 44 Mich App 447, 450; 205 NW2d 189 (1973), and a defendant may be charged as a principal and convicted as an aider and abettor, *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Thus, it was not improper for the prosecutor in this case to request that the trial court issue an instruction regarding aiding and abetting. Furthermore, it was proper for the trial court to give the aiding and abetting instruction. A jury instruction on aiding and abetting is appropriate where there is some evidence of a concert of action between the defendant and the principal. *People v Mann*, 395 Mich 472, 478; 236 NW2d 509 (1975). Defendant's in-court testimony and his prior statement to the police provided some evidence of a concert of action between defendant and Colbert. Therefore, the instruction was proper.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Michael J. Talbot

[1] Defendant argues for the first time on appeal that his statement to the police should not have been considered as evidence based on the corpus delicti rule. Appellate review of an alleged violation of this rule is precluded by the defendant's failure to bring it to the attention of the trial court, absent manifest injustice. *People v Beard*, 171 Mich App 538, 548; 431 NW2d 232 (1988). We decline to review this unpreserved issue as the failure to do so would not result in manifest injustice.

[2] At trial, defendant objected to the aiding and abetting instruction based on lack of evidence to support the instruction.